No. 81977-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Linda Eastwood, d/b/a Double KK Farm, *Petitioner,*

v.

Horse Harbor Foundation, Inc.,
a Washington Corporation, and Maurice Allen Warren, a single person;
Katherine Daling and Michael Daling, a husband and wife and the marital community composed thereof, *Appellants.*

Kitsap County Superior Court
Cause No. 04-2-01561-0

SUPPLEMENTAL BRIEF OF PETITIONER EASTWOOD

David P. Horton, WSBA No. 27123
LAW OFFICE OF DAVID P. HORTON, INC. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444
(360) 692-1257 Facsimile
Attorney for Petitioner

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I. INTRODUCTION

The economic loss rule does not bar a lessor's claims for waste arising from the failure to properly maintain the leased premises. This is because waste is a statutory tort independent of any contract. If the appellate court's decision correctly states Washington law, a permissive waste claim by a landlord is always barred by the economic loss rule. This is contrary to Washington precedent.

Further, as here, damages in a waste case are not purely economic losses – they are physical damage to property. The doctrine is inapplicable.

The appellate court's error starts with their conclusion that Ms. Eastwood's contractual relationship with Horse Harbor Foundation -- the lease -- bars a waste claim sounding in tort. This error leads to the erroneous conclusion that Ms. Eastwood's claims against the individual defendants were based on contract – not tort. Because RCW 4.24.264 only allows liability against nonprofit directors and officers for gross negligence (a tort claim), the appellate court concluded Ms. Eastwood's claims were barred.

This conclusion is error because the existence of a lease does not act as a bar to a statutory waste claim. Ms. Eastwood's claims against the individual defendants were for a tort – waste. The individuals' gross negligence caused permissive waste. The appellate court did not address this claim.

Once these errors are brought to light, the trial court's unchallenged factual findings, that the individual defendants committed gross negligence leading to waste, dictate the result. They are liable for their tortious conduct. The appellate court should be reversed.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's brief and the petition for review state the detailed facts found by the trial court after a nine day trial.[1] These findings were not challenged on appeal.[2]

Ms. Eastwood leased a pristine horse farm to Horse Harbor Foundation. Ms. Daling was the Foundation's president and was responsible for the lease and supervising Mr. Warren who in turn was responsible for the facilities' day to day maintenance.[3]

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[1] CP 121-131.
[2] See Brief of Appellant at 1.
[3] CP 124 - 125.

Soon after they took possession, Ms. Eastwood noticed the Foundation's maintenance program was lacking.[4] So she let them know – repeatedly – in writing. Ms. Daling and Mr. Warren ignored the warnings.[5] The warnings were discussed in board meetings but no action was taken.[6]

The trial court found that "there was a broad, persistent, and systemic failure in defendants' care of [the] facility and even its own horses."[7] Further, the "the degree of neglect, its persistence and visibility" supported a finding that the care exercised by Ms. Daling and Mr. Warren "was substantially and appreciably greater than ordinary negligence."[8] The trial court concluded that "[t]his gross negligence resulted in waste and damage to plaintiff's farm and they are liable for the damage it proximately caused."[9]

The defendants did not raise the economic loss rule as a defense at trial or on appeal. Nevertheless, the appellate court concluded that the economic loss rule barred Ms. Eastwood's tort claims. While appellate

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[4] CP 232.
[5] Id; CP 126.
[6] CP 126.
[7] CP 121 – 232.
[8] CP 127 – 131.
[9] CP 133.

courts may raise issues *sua sponte* in limited circumstances, it was not appropriate here:

> The court has allowed such practice when the parties have ignored a governing statute, *Maynard Investment Co., Inc. v. McCann,* 77 Wash.2d 616, 623, 465 P.2d 657 (1970), or when constitutional rights are at issue, *State v. Hieb,* 107 Wash.2d 97, 108, 727 P.2d 239 (1986).[13]

Neither is the case here. Indeed, the same month Division Two decided Ms. Eastwood's case *sua sponte,* citing to the economic loss rule, they refused to allow a party to raise the economic loss rule for the first time on appeal:

> We conclude that the Fritzes waived their economic loss argument by not raising it before the trial court. RAP 2.5(a); *Better Fin. Solutions Inc. v. Caicos Corp.,* 117 Wash.App. 899, 912-13, 73 P.3d 424 (2003).[14]

Here, the economic loss rule was not raised in the trial or appellate court. Because the economic loss rule was never raised or argued there has been no discussion or reasoned decision applying the economic loss rule to a waste claim. Ms. Eastwood was not given the opportunity to rebut

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[13] *King County v. Washington State Boundary Review Bd. for King County,* 122 Wash.2d 648, 670, 860 P.2d 1024, 1036 (1993).

[14] *Bloor v. Fritz,* 143 Wash.App. 718, 739, 180 P.3d 805, 17 (2008).

this claim factually at trial or legally on appeal. The appellate court should be reversed.

III. SUPPLEMENTAL ARGUMENT

A. THE ECONOMIC LOSS RULE DOES NOT BAR A WASTE CLAIM ARISING FROM A LEASE.

The appellate court held Ms. Eastwood's claims were barred by the economic loss rule because Horse Harbor Foundation had a written lease setting out the parties' obligations. The appellate court classified her claim as one arising from contract. ("Eastwood based her claims against Warren and the Dalings on a contractual theory of recovery...")[15] This is not true. Ms. Eastwood made a waste claim and the trial court found the defendants committed waste.

The economic loss rule does not bar Ms. Eastwood's waste claim for several reasons. First, waste is a statutory cause of action that cannot be barred by a judicial doctrine. Second, waste is a tort independent from any obligation imposed by lease. Finally, this is not an "economic loss" case because the defendants caused more than pure economic losses – they caused actual physical harm.

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[15] Opinion at 4.

1. Waste is a statutory tort.

Waste is conduct by a person in possession of land, actionable by another with an interest in the land to protect the nonpossessing party's reasonable expectations.[16] Both contract and property law contributed to the shaping of the action for waste, but it originated as a tort.[17] Although there has been no Washington case stating such explicitly, other jurisdictions and commentators agree that waste is a tort.[18]

Waste is based on the common law and explicitly adopted in Washington by statute.[19] This duty to not cause damage to real property, while possibly incorporated in a lease, is a duty imposed by statute.

A lease is not only a contract, as stated in the appellate court's opinion, but it is also a conveyance. "Generally, a lease is a conveyance of

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[16] R. Powell, *Powell on Real Property,* ¶636 (1989).
[17] Id.
[18] See *Vollertsen v. Lamb,* 302 Or. 489, 508-509, 732 P.2d 486, 497 (1987); *Jones v. Bierek,* 88 Or.App. 11, 14, 743 P.2d 1153, 1154 (1987); *Independence Lead Mines v. Hecla Mining Co.,* 143 Idaho 22, 29, 137 P.3d 409, 416 (2006); *Genesco Inc. v. Monumental Life Ins. Co.*, 577 F.Supp. 72, 84 (D.C.S.C., 1983); *Chetek State Bank v. Barberg*, 170 Wis.2d 516, 522, 489 N.W.2d 385, 387 (Wis.App.,1992); *Rudnitski v. Seely*, 452 N.W.2d 664, 666 -667 (Minn.,1990) 78; *Feliciana Bank & Trust v. Manuel & Sessions*, L.L.C., 943 So.2d 736, 742 (Miss.App., 2006); *U.S. v. Miller,* 400 F.Supp. 1080, 1084 (D.C.N.Y. 1975); Am.Jur.2d, *Waste* § 1; *Powell, supra.*
[19] RCW 64.12.010.

a limited estate for a limited term with conditions attached."[20] Independent of any contractual obligations under a written lease, a tenant has an obligation incident to the leasehold to not commit waste.

This has been long recognized by the legislature:

> **RCW 64.12.010. Waste actionable:**
>
> Wrongs heretofore remediable by action of waste shall be subjects of actions as other wrongs.

It has long been recognized by our courts:

> Waste is an unreasonable and improper use and abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury thereto. It is a violation of the obligation of the tenant to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration...[21]

Negligence often causes waste. As stated in *Moore,* waste is "the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an

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[20] *Resident Action Council v. Seattle Housing Authority*, 162 Wash.2d 773, 778, 174 P.3d 84, 87 (2008).

[21] *Moore v. Twin City Ice & Cold Storage Co.*, 92 Wash. 608, 611, 159 P. 79, 780 (1916).

underlying interest, undeteriorated by any willful or negligent act."[22] That waste can be based on negligence is well established. In *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,*[23] the court discusses the difference between commissive waste (a destructive or voluntary act) and permissive waste (implying negligence or omission to do that which would prevent injury).

If the appellate court's opinion accurately states Washington law, it is impossible for a landlord to bring a permissive waste claim. The cause of action would be eviscerated. A landlord would be limited to contract remedies.

This would constitute a significant change in Washington law and render RCW 64.12.010 superfluous. That statute permits a waste action even when there is a lease – as was the common law. The appellate court ignores this statute.

They concluded that because the parties negotiated their rights and responsibilities under contract, a tort claim was barred. But Ms. Eastwood's action for waste was not on the covenant of the lessee but on

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[22] *Id.*

[23] *Fisher Properties, Inc. v. Arden-Mayfair, Inc.,* 106 Wash.2d 826, 726 P.2d 8 (1986).

the liability created by the statute.[24] Oregon's Supreme Court came to this conclusion in *Vollertsen v. Lamb:*

> We read the opinion of the Court of Appeals as construing landlord's claim to arise solely under the written rental agreement that was made a part of landlord's brief in the Court of Appeals. We conclude that landlord was here claiming on the duty imposed by ORS 105.805 and not on the specific terms of the written agreement. That statute imposes on a tenant the duty to take proper care of the premises. The terms of the written agreement, although to the same effect, imposed no new obligations on tenants. This court so held in *Winans v. Valentine,* 152 Or. 462, 467, 54 P.2d 106 (1936). The opinion in *Winans* unfortunately treats the duty of the tenant as if it were an "implied covenant" in a lease. It is not. The nature of the claim is for damages for a tort.[25]

Ms. Eastwood's waste claim is one arising from statutory tort law, independent from the lease.

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[24] *See* RCW 64.12.010-020; *See also McLeod v. Ellis*, 2 Wash. 177, 26 P. 76 (1891); *Delano v. Tennant,* 138 Wash. 39, 244 P. 273 (1926); *Graffell v. Honeysuckle,* 30 Wash.2d 390, 392, 191 P.2d 858, 59 (1948); *In re Standard Aero Corp. of New York,* 270 F. 779, 781 – 782 (C.A.3 1921).

[25] *Vollertsen v. Lamb*, 302 Or 489, 732 P.2d 486 (1987).

The appellate court's holding fails to recognize a lease's dual nature (a contract ***and*** a conveyance)[26] and runs contrary to the way our courts have imposed liability for negligent acts that cause waste. Usually, a tenant has possession under a lease. And that lease generally controls the relationship between the parties. This Court's oft-cited case on waste, *Graffell v. Honeysuckle*[27] was a case involving a written lease.

Permissive waste is caused by negligence.[28] For example, if a tenant negligently burns down a leasehold structure the landlord may bring a waste action. If the lease did not address this eventuality, a landlord would rely on the statutory remedy provided by the legislature. Applying the appellate court's reasoning, the landlord would be without a remedy.

The *Alejandre* court recognized that the economic loss rule does not bar a statutory claim.[29] Landlords generally, and Ms. Eastwood specifically, have relied on Washington's waste statute to protect them from permissive waste. A lease may not address this issue because as discussed above, there is an obligation imposed by common law to not commit waste.

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[26] *Resident Action Council v. Seattle Housing Authority*, 162 Wash.2d 773, 778, 174 P.3d 84, 87 (2008).

[27] *Supra.*

[28] *Moore v. Twin City Ice & Cold Storage Co.*, 92 Wash. 608, 611, 159 P. 79, 780 (1916).

29 *Alejandre v. Bull*, 159 Wash.2d 674, 685, 153 P.3d 864, 870 (2007).

The Residential Landlord Tenant Act[30] is another example where the legislature has imposed duties on landlords and tenants that exist whether or not the issue is addressed in a lease. Examples exist in other contexts as well. For example, the Consumer Protection Act[31] imposes liability for unfair or deceptive practices even in relationships governed by contract. A court cannot nullify these legislatively imposed duties simply because a contract exists between the parties. As addressed in Ms. Eastwood's petition for review, this would implicate separation of powers issues.[32]

2. Waste deals with property damage – not economic loss.

The appellate court cites to *Alejandre v. Bull*[33] for the proposition that because Ms. Eastwood's property was leased to Horse Harbor Foundation, she is limited to contract remedies. But the court did not correctly analyze Ms. Eastwood's claims under *Alejandre* or the precedent upon which it is based. *Alejandre* states:

> In general, whereas tort law protects society's interest in freedom from harm, with the goal of restoring the plaintiff to the position he or she was in prior to the

30 RCW 59.18.
31 RCW 19.86.
32 *Windust v. Department of Labor and Industries*, 52 Wash.2d 33, 323 P.2d 241 (1958).
33 159 Wash.2d 674, 153 P.3d 864 (2007).

> defendant's harmful conduct, contract law is concerned with society's interest in performance of promises, with the goal of placing the plaintiff where he or she would be if the defendant had performed as promised. [34]

Then, quoting from *Stuart v. Coldwell Banker Commercial Group, Inc.*, the court says:[35]

> Tort law has traditionally redressed injuries properly classified as physical harm. W. Prosser, *Torts* § 101, at 665 (4th ed. 1971). Tort law is concerned with the obligations imposed by law, rather than by bargain.[36]

The Court then goes on to direct that in determining whether the economic loss rule applies, a court "should identify whether the particular injury amounts to economic loss or physical damage."[37]

Under this precedent, the economic loss rule does not apply. The duty to not commit waste is imposed by a statute, not by bargain. The defendants caused physical damage to real property – not mere economic losses. Under *Stuart and Alejandre*, the economic loss rule does not apply to the claims against any defendant. But even if Ms. Eastwood's claims

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[34] *Id* at 682.
[35] 109 Wash.2d 406, 420, 745 P.2d 1284, 1291 (1987).
[36] *Id.*
[37] *Id.*

against the Foundation were barred by the economic loss rule, this does not bar her separate claims against the individuals.

B. BASED ON THE TRIAL COURT'S UNCHALLENGED FACTUAL FINDINGS THE INDIVIDUAL DEFENDANTS ARE LIABLE TO MS. EASTWOOD.

1. Ms. Daling is liable under RCW 4.24.264

Because the lower court mischaracterized Ms. Eastwood's claims against the individual defendants as contract claims, they erred. This error starts with a misstatement regarding the trial court's rationale. The appellate court stated:

> The trial court interpreted RCW 4.24.264 such that a nonprofit director or officer would be individually liable where a breach of contract rose to gross negligence[38]

But that is not what the trial court found. The trial court found that the defendants' gross negligence caused waste.[39]

Under RCW 4.24.264 a nonprofit's director or officer "is not liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity...unless the decision or failure to decide constitutes gross negligence." The trial court found Ms. Daling's discretionary decisions were grossly negligent. As addressed above,

[38] Court's Opinion at 4.
[39] CP 133.

permissive waste is the result of negligence. Gross negligence is a species of negligence.[40]

Ms. Daling is liable under the statute for her gross negligence – her decisions to not heed Ms. Eastwood's warnings to properly maintain the property. The appellate court concluded that RCW 4.24.264 only addresses nonprofit directors' and officers' potential tort liability. This is correct. But because Ms. Daling's decisions constituted gross negligence, she is liable under the waste statute for her tort liability.

2. Mr. Warren is liable because his gross negligence caused waste.

The same error occurred regarding Mr. Warren's liability. The court stated:

> "As for Warren, the trial court found that agents and employees of nonprofit corporations may be liable for "misconduct which causes damages to persons or property." However true that may be for agents or employees under tort law, the economic loss rule also applies in these circumstances...."[41]

Because the economic loss rule does not apply in these circumstances, this conclusion is also error.

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[40] *Nist v. Tudor*, 67 Wash.2d 322, 332, 407 P.2d 798, 804 (1965).
[41] Court's Opinion at 5.

IV. ATTORNEY'S FEES

A prevailing party is entitled to fees on appeal if permitted by statute.[42] A prevailing party in a waste action is entitled to her attorney's fees and costs under RCW 64.12.020:

> ...The judgment [for plaintiff in a waste action], in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court.[43]

Under RAP 18.1 Ms. Eastwood should be entitled to her reasonable attorneys' fees on this appeal.

V. CONCLUSION

The trial court found that the individual defendants committed waste by acts and omissions that constituted gross negligence. Ms. Eastwood should be able to rely on Washington's well established statutory and common law permitting an action for waste even when the

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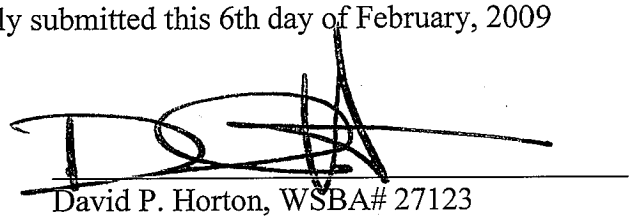
[42] RAP 18.1; *Bayo v Davis*, 127 Wn. 2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330, T*acoma Northpark, LLC v. NW, LLC,* 123 Wash.App. 73, 96 P.3d 454 (2004).

[43] RCW 64.12.020.

tenancy is governed by a lease. The appellate court's decision should be reversed.

Respectfully submitted this 6th day of February, 2009



David P. Horton, WSBA# 27123
LAW OFFICE OF DAVID P. HORTON, INC. P.S.
3212 NW Byron Street, Suite 104
Silverdale, WA 98383
(360) 692-9444
Attorney for Petitioner